

SERVED: March 18, 1993

NTSB Order No. EA-3816

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 5th day of March, 1993

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|----------------------------------|---|-----------------|
| _____ |) | |
| JOSEPH DEL BALZO, |) | |
| Acting Administrator, |) | |
| Federal Aviation Administration, |) | |
| |) | |
| Complainant, |) | |
| |) | Docket SE-11096 |
| v. |) | SE-11097 |
| |) | |
| JOHN R. FROHMUTH and |) | |
| JOHN DWORAK, |) | |
| Respondents. |) | |
| _____ |) | |

OPINION AND ORDER

The Administrator has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on October 2, 1990, following an evidentiary hearing.¹ The law judge dismissed an order of the Administrator suspending respondents' airline transport pilot certificates for 30 days for

¹The initial decision, an excerpt from the hearing transcript, is attached.

violations of 14 C.F.R. 91.75 (a) and (b).² We deny the appeal.

Respondents were operating Continental Flight 147H³ from Houston Intercontinental Airport to Los Angeles on January 7, 1989. On departure from Houston, the aircraft deviated from ATC altitude instructions.⁴ Respondents claimed, and the law judge found, that the deviation should be excused because they reasonably believed they were cleared to 15,000 feet. The question before us is whether this claim and the law judge's finding is supported by the evidence. We find that, in these particular and unique circumstances, it is.⁵

²Respondent Frohmuth, the first officer on the aircraft, was charged only with violating § 91.75(b). Respondent Dworak, the pilot-in-command, was charged with both violations. These rules provided as follows:

(a) When an ATC [air traffic control] clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless an amended clearance is obtained.

(b) Except in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised.

³Sometimes the aircraft is referred to as 147 Heavy. Although the transcript of the tower tape refers to the flight as "flight 147H," such a call sign incorrectly suggests "147 Hotel." It should more appropriately have been referred to as "flight 147 Heavy," reflecting the required radio call sign suffix for aircraft capable of takeoff weights of 300,000 pounds or more.

⁴As discussed in more detail below, Flight 147H was cleared to 5,000 feet. Another Continental Flight, 759, was cleared to 15,000 feet. Respondents believed that the clearance issued to Flight 759 was directed to them. The deviation was corrected at approximately 7,000 feet (see Exhibit A-3).

⁵Contrary to respondents' suggestion in reply, answering this question does not involve issues of witness credibility typically within the province of the law judge. The issue is not

A review of the tower transcript (Exhibit A-2) is critical to any conclusions in this case. A key excerpt from the tape is reproduced below.

| TIME | SPEAKER | TEXT |
|---------|---------|--|
| 1551:43 | ATC | Ok Continental one forty-seven heavy Houston departure radar contact climb and maintain five thousand |
| 1551:47 | 147H | Five thousand Continental one forty-seven heavy |
| 1552:22 | ATC | Continental one forty-seven heavy in your turn traffic is at eleven to twelve o'clock and eight miles six thousand feet northeastbound a uh E one twenty |
| 1552:31 | 147H | Ok we're still in the clouds we're looking for him |
| 1552:34 | ATC | K Continental seven fifty-nine maintain one five thousand [15,000] |

[short squeal on tape; could be heard by ATC but not by 147H]

| | | |
|---------|------|---|
| 1552:41 | 147H | [. . . .] Tops are four thousand ⁶ |
|---------|------|---|

(..continued)

whether respondents' version of events is truthful or whether they believe it to be; the issue is whether their actions were reasonable in the circumstances. Findings of fact underlying that analysis are susceptible of de novo review. Administrator v. Wolf, NTSB Order EA-3450 (1991) (Board may reverse the initial decision and affirm the Administrator's order on concluding that the law judge's factual findings could not be reconciled with the evidence); Administrator v. Schneider, 1 NTSB 1550 (1972) (in making factual findings, the Board is not bound by the examiner's findings).

⁶The un rebutted evidence indicates that, prior to this statement, and during the tape's squeal, respondents had acknowledged the clearance to 15,000 feet that was given to Continental Flight 759 at 1552:34. At the point full audibility returned, respondents were providing ATC with cloud/visibility

| | | |
|---------|-----|---|
| 1552:42 | ATC | Tops are four thousand thank you |
| 1552:55 | 759 | Confirm Continental seven fifty-nine up to fifteen thousand |
| 1552:58 | ATC | Continental seven fifty-nine yes sir maintain one five thousand |

The law judge concluded that ATC's different statements intended to be directed to Flights 147H and 759 (at 1552:34) were not clearly separated and that it was reasonable for respondents to believe, given the context of the transmissions (especially respondents' attested acknowledgment of the clearance and lack of dispute of it by ATC), that the 15,000-foot clearance was for them. He supported his conclusion with a finding that, because Flight 759 asked for confirmation of the clearance rather than simply acknowledging it, the clearance process must have been confusing.

We believe that the administrative law judge has reached the appropriate answer because we believe that (1) the actions of the controller were probably instrumental in initiating the mishearing by the crew of 147H, (2) the crew, albeit having misheard a clearance, followed prudent procedure in giving a complete readback of the clearance it believed to have been directed to them, at which point (3) only the controller was in a position to suspect that a misreading had occurred, but instead of seeking confirmation, the controller acknowledged only a

(..continued)
information.

partial transmission. We do not by any means intend that our decision here affirming the law judge be read to minimize the importance of careful attention to tower transmissions, or to suggest that pilots will, as a general rule, not be held accountable when they mistakenly believe that a particular clearance has been given them. Nevertheless, airmen cannot be held to a strict liability standard for ATC deviations when their mistaken behavior is apparently induced and then ratified by ATC's actions.

While the administrative law judge's opinion is not a model of clarity, it seems certain that he believed that the controller could have prevented any misunderstanding by separating her acknowledgment at 1552:34 of a transmission from the crew of 147H from her following clearance to flight 759. From our perspective that is the clearly proper course, whether accomplished by a discernible pause or the use of instructive terminology such as the term "break." Failing to separate the discussion either by words or a pause was an invitation to error by a flight crew.⁷ Second, the administrative law judge was aware that the crew of 147H could not hear the squeal that blocked the simultaneous transmission from the two aircraft. Hence he could conclude that the crew of Flight 147H reasonably assumed that ATC had heard their confirmation of the 15,000-foot clearance and that, because ATC did not disagree, instead saying thank you to the weather

⁷It would be useful, we think, if the meaning and use of the term "break" were included in the Air Traffic Controller's Manual and the Airman's Information Manual.

report, respondents had no reason to question their assumption.

We cannot take issue with these conclusions. The crew of 147H made a mistake in mishearing a clearance, but thereafter followed a procedure which should have brought that mistake to their attention. They read back the full clearance and received no disagreement from ATC. In fact they appeared to receive confirmation. On the other hand, the controller heard a squeal and acknowledged the fact that this resulted from two simultaneous transmissions, only a part of which she heard. And, despite receiving no immediate response from Flight 759 to the clearance, she did nothing to clarify the situation. Both factors should have alerted her to a problem. Good practice would have been to say immediately that a transmission she received was "stepped on" to alert everyone who had just transmitted that they may not have been heard, and then to repeat the instruction to Flight 759 and receive an acknowledgement from it.

We have said that "it is the pilot's responsibility to be absolutely sure to comply with ATC instructions." Administrator v. Berg, NTSB Order EA-3564 (1992), slip op. at 2, 5 (violation of § 91.75(b) established when pilot mistakenly believed clearance issued to another aircraft applied to him). That being so, it is also true that compliance with ATC clearances is initiated best by a full readback of course and altitude clearances, as the readback is intended to insure that compliance with the instructions is based on an accurate understanding. The

course deviation here was not intentional, careless, or the result of a lack of professionalism. See discussion in Administrator v. Dunkel, 2 NTSB 2250, 2254 (1976) ("It is the knowing nature of the violation which not only carries with it the reckless nature of the operation but which requires the imposition of a disciplinary sanction."). See also Administrator v. Snead, 2 NTSB 262 (1973), and cases cited there (violation should not be found when ATC involvement was the initiating factor).

In this context, we cannot find that respondents failed to exercise the degree of care required of them. Administrator v. Nelson & Keegan, 2 NTSB 1900 (1975), does not require a contrary finding. "The initiating and principal cause of the deviation cannot be laid sufficiently to respondents' lack of care to warrant upholding the Administrator's order."⁸

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and
2. The initial decision dismissing the Administrator's order is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁸Accord Administrator v. Holstein, NTSB Order EA-2782 (1988). There, the complaint was dismissed because the controller's use of language allowed two aircraft reason to believe a clearance applied for both.